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Private Easements in Public Ways

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COMMENTS

PRIVATE EASEMENTS IN PUBLIC WAYS

Few property owners realize that their right to travel on public thoroughfares is not an absolute right. Private demand as well as public need often necessitates official vacation or alteration of the public easement in dedicated streets and highways, requiring a value judgment to be made between public benefit and private injury when the matter reaches the litigation stage. The issue discussed in this Comment typically presents itself when the city, county, or state vacates or alters a land service road,[1] dedicated for general access of residents in the area, to expedite a program of urban renewal or new highway facilities. Upon such action being taken, the problem is raised as to whether the resident-user can obtain compensation for the loss in property value, due to the elimination of access rights.

Ordinarily private owners purchase property relying on representations as to the existence of public streets, alleys, or other facilities indicated on the plat to which the vendor refers. Therefore, upon public vacation or alteration, the problems created are first, an evaluation of the creation and nature of easement rights acquired by private property owners in the subdivision, and second, the compensation obtainable for deprivation of these rights by public action.

Two basic rights will be separately discussed in this Comment. First, the public right of user in streets dedicated for public use will be referred to as the "public easement"; and second, the private right of user created by estoppel, hereinafter called the "private easement." Although each is created in a similar manner, each propagates common as well as distinguishable property rights. In connection with the discussion of these easements, some reference will also be made to other analogous easements created by similar theories, for the purpose of furnishing background and comparison.

[1] "Land-service road" is a term used to describe the ordinary road or highway, constructed to enable abutting landowners to have access to the outside world, as distinguished from the "limited-access" road which is a "traffic-service road" designed primarily to move traffic. Conversely, a limited-access highway may be defined as a roadway designed particularly for the movement of through traffic, upon which cross traffic has been eliminated or severely curtailed, with entrances and exits strictly controlled, and as to which abutting landowners have no easement or right of access different from that enjoyed by the general public. Such highways are sometimes called "freeways," "thruways," "expressways," "parkways," or "belt-lines." See Annot., 43 A.L.R.2d 1072 (1955).

THE CREATION OF THE PRIVATE EASEMENT IN PUBLIC WAYS

The cases generally hold that the grantee purchasing land with reference to a map or plat, delineating streets or alleys vital to his ingress and egress, may acquire an easement over these ways even though his lot does not abut on the particular street or alley.[2] A more liberal rule, not requiring the element of necessity for ingress and egress, gives the grantee to whom a conveyance is made by reference to map or plat a private right to use all streets and alleys delineated thereon.[3]

Three general theories of creation of these private easements are asserted by the courts. The first is an easement arising by estoppel; one who conveys land with reference to map or plat, without including such reference in the deed itself, is estopped to deny the existence of the easement because of his inducing the grantee to believe that the streets or other public places exist as indicated on the plat.[4] This is called estoppel by representation.[5] Second is the view that a conveyance with reference to the map or plat incorporated into the deed gives rise to an implied grant of easement.[6] A third view, which is severely criticized by prominent authors,[7] is that an easement is created by "implied dedication" when the grantor sells with reference to a map or plat.[8] In this case estoppel is probably a better analysis than implied dedication. The grantor who induced the reliance should be held for the ways he indicated in persuading the grantee to make the purchase. Likewise, common grantees claiming under such a grantor are estopped as against each other to deny the easement.[9]

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[2] Burke v. Wall, 29 La. Ann. 38, 29 Am. Rep. 316 (1877); Downey v. Hood, 203 Mass. 4, 89 N.E. 24 (1909); Pearson v. Allen, 151 Mass. 79, 23 N.E. 731 (1890); Fox v. Union Sugar Ref., 109 Mass. 292 (1872); Kelley v. Penfield, 133 App. Div. 367, 117 N.Y.S. 379 (1909); Henson v. Stine, 74 Ohio App. 221, 57 N.E.2d 785 (1943); see also Annot., 7 A.L.R.2d 607.

[3] Annot., 7 A.L.R.2d 607, 613 (1949).

[4] 3 TIFFANY, REAL PROPERTY § 800, p. 31, n. 5 (1939) (citing Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891 (1916)).

[5] *Ibid.*

[6] 1 THOMPSON, REAL PROPERTY, § 409 (3d ed. 1939).

[7] 3 POWELL, REAL PROPERTY, § 409 (1952); 3 TIFFANY, REAL PROPERTY, § 800 (1939).

[8] Prescott v. Edwards, 117 Cal. 298, 49 Pac. 178 (1897); Maywood Co. v. Village of Maywood, 118 Ill. 61, 6 N.E. 866 (1886); Hille v. Nill, 58 N.D. 536, 226 N.W. 635 (1929); Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891 (1916).

[9] Threedy v. Brennan, 131 F.2d 488 (7th Cir. 1942); Severo v. Pache Co., 75 Cal. App.2d 30, 170 P.2d 40 (1946); Moffatt v. Tight, 44 Cal. App.2d 643, 112 P.2d 910 (1941); Fisk v. Ley, 76 Conn. 295, 56 Atl. 559 (1903); Mills v. Smith, 203 Ga. 444, 47 S.E.2d 260 (1948); McCue v. Berge, 385 Ill. 292, 52 N.E.2d 789 (1944); Schickli v. Keeling, 307 Ky. 210, 210 S.W.2d 780 (1948); James v. Delery, 211 La. 306, 29 So. 2d 858 (1947); Bartlett v. City of Bangor, 67 Me. 460 (1878); Dubinsky v. Cama, 261 Mass. 47, 158 N.E. 321 (1927); Horton v. Williams, 99 Mich. 423 (1894); Dill v. School Board, 47 N.J.Eq. 421, 20 Atl. 739 (1890); Mills v. City of New York, 269 App. Div. 306, 55 N.Y.S.2d 538 (1945); Harder v. Ambassador Realty Co., 258 App. Div. 922, 16 N.Y.S.2d 717 (1939); Broocks v. Muirhead, 223 N.C. 227, 25 S.E.2d 889

The tendency of some courts, to refer to a sale of land by reference to an unrecorded plat as creating an easement by implied dedication,[10] leads to confusion of the public and private easement.[11] A factor which contributes to this confusion is the rule that one whose property abuts on an existing street or alley is deemed to have private rights of ingress and egress from his property to that street or alley.[12] However, this right of ingress and egress arises not by estoppel, or implied dedication, but rather because the property owner bought land on a street which was already committed to public use. Therefore the owner shares the public easement, which is not dependent on his being a property owner, and he may also have a private easement arising by virtue of estoppel or implied grant. The latter right cannot be taken without full compensation and due process.[13]

(1943); Fidelity-Philadelphia Trust Co. v. Forster, 346 Pa. 59, 29 A.2d 496 (1943); Wilson v. Acree, 97 Tenn. 378, 37 S.W. 90 (1896); Boyd v. Dillard, 151 S.W.2d 847 (Tex. Civ. App. 1941); Lindsay v. James, 188 Va. 646, 51 S.E.2d 326 (1949); Howell v. King County, 16 Wn.2d 557, 134 P.2d 80 (1943); *In re* Vacating Platt of Chiwaukee, 254 Wis. 273, 36 N.W.2d 61 (1949).

[10] Highland Realty Co. v. Avondale Land Co., 174 Ala. 326, 56 So. 716 (1911); Nash v. Pendleton, 183 Ark. 339, 35 S.W.2d 1002 (1931); Holthoff v. Joyce, 174 Ark. 248, 294 S.W. 1006 (1927); Harrison v. Augusta Factory, 73 Ga. 447 (1884); Village of Benld v. Dorsey, 311 Ill. 192, 142 N.E. 563 (1924); Schneider v. Jacob, 86 Ky. 101, 5 S.W. 350 (1887); City of New Orleans v. Carrollton Land Co., 131 La. 1092, 60 So. 695 (1913); Horton v. Williams, 99 Mich. 423, 58 N.W. 369 (1894); Schaller v. Town of Florence, 193 Minn. 604, 259 N.W. 529 (1935); Skrmetta v. Moore, 202 Miss. 585, 30 So. 2d 53 (1947); Schell v. Jefferson, 357 Mo. 1020, 212 S.W.2d 430 (1948); Heitz v. City of St. Louis, 110 Mo. 618, 19 S.W. 735 (1892); Kesselman v. Goldsten, 148 Neb. 452, 27 N.W.2d 692 (1947); Shearer v. City of Reno, 36 Nev. 443, 136 Pac. 705 (1913); Carter v. City of Portland, 4 Ore. 339 (1873); Walker v. Walker, 153 Pa. Super. 20, 33 A.2d 455 (1943); Wolf v. Brass, 72 Tex. 133, 12 S.W. 159 (1888); Shertzer v. Hillman Inv. Co., 52 Wash. 492, 100 Pac. 982 (1909); Lueders v. Tenino, 49 Wash. 521, 95 Pac. 1089 (1908).

[11] In an early California case, People v. Reed, 81 Cal. 70, 22 Pac. 474 (1889), the court made a clear distinction between public and private rights growing out of the conveyance of lots by reference to a map or plat, stating: "It is well settled... that the making and filing of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and that the dedication does not become effectual and irrevocable until the same is accepted by the public.... But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the public, but the filing; and where the right to claim the street by the public rests upon the map alone, there is no offer to be accepted until the same is filed for record." The court further pointed out that as between common grantees the only rights arising would be by virtue of estoppel. The court recognized the fact that there were authorities sustaining the position that where the owner surveys and plats his property, and makes sales of lots with reference to such plat, the streets designated thereon are irrevocably dedicated to the public as streets, but continued: "it may be different as between [the property owner] and private individuals to whom he has made sales of property with reference to the map. Much of the confusion in the decided cases has... grown out of the failure to distinguish between the right of the public authorities to claim a dedication, and the right of the purchaser to compel the opening of a street on the ground of estoppel."

[12] Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942). See also 25 AM. JUR., *Highways* § 154, p. 448, n. 13.

[13] City of York v. Iowa-Nebraska Light & Power Co., 109 F.2d 683 (8th Cir. 1940), *cert. denied* 309 U.S. 690 (1940). People v. Russell, 48 Cal.2d 189, 309 P.2d 10 (1957);

As in the case of the abutting owner, the nonabutting landowner can conceivably have two distinct easement rights: the first is the above mentioned public right; the second is the easement right arising by estoppel or implied grant. However, the extent of the nonabutting owner's easement is subject to a great deal of confusion.[14] There are three general views[15] adopted by different jurisdictions to determine the extent of the nonabutter's easement rights in streets of the subdivision.[16]

The Blending Theory. The confusion resulting from failure to distinguish between the private easement and the public easement leads some courts to a conclusion that the pre-existing private easement will blend with the public easement upon actual or implied dedication of the subdivision.[17] This may be termed the "blending theory." Application of this theory leads to utter confusion regarding the private owner's rights. For example, assume grantee purchases Blackacre relying on a plat delineating streets, alleys, and parks prior to the dedication of the plat. Upon such a purchase, most courts recognize the existence of a private easement to ways delineated on the plat to which the grantor made reference. The taking of such an easement right would be compensable.[18] Assume that subsequently the grantor dedicates the plat, and the municipality accepts. Now the grantee has, over and above his private right of user (if such still exists after dedication), a public right or easement in the streets of the subdivision. Does the mere acquisition of a public easement by virtue of dedication extinquish this prior private right, which could have been enforced

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Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942); Siemers v. St. Louis Elec. Terminal Ry., 343 Mo. 1201, 125 S.W.2d 865 (1938); see also 39 C.J.S. *Highways* § 141.

[14] See Annot., 7 A.L.R.2d 607.

[15] The "broad" view, or "unity" rule is that the private right of the grantee extends to all the streets, alleys, parks, or other open areas delineated upon the plat. The "intermediate" view, or "beneficial" or "full enjoyment" rule is that the extent of such private right is limited to such streets and alleys as are reasonably or materially beneficial to the grantee and of which the deprivation would reduce the value of his lot. The third view is the "narrow" or "necessary" rule, which provides that such a private right is limited to the abutting streets and such others as are necessary to give the grantee access to a public highway.

[16] Washington apparently follows a rule similar to the narrow rule, holding that the nonabutting owner is entitled only to reasonable and necessary access to his property. Capitol Hill Methodist Church v. City of Seattle, 52 Wn.2d 359, 324 P.2d 1113 (1958), noted 34 WASH. L. REV. 212 (1959).

[17] Washington, fortunately, does not follow this rule. See cases cited in 7 A.L.R.2d 608, 616 (1949).

[18] See notes 12 and 13 *supra*. Regarding the use of an injunction against other common grantees obstructing this easement right, see Gerald Park Improvement Ass'n v. Bini, 138 Conn. 232, 83 A.2d 195 (1951) (where the association was held to have violated an owner's rights by placing a guard and gate to keep public trespassers from using private beach facilities in a restricted subdivision).

as against the grantor and common grantees?[19] If it does, then the owner is at the mercy of the municipality, since if the latter subsequently vacates or alters any street of the subdivision, the lot owner no longer has the right to those things which may have induced his purchase. The subsequent acquisition of public rights of way, by dedication, does not justify the result of extinguishment of private rights of user, even in jurisdictions following the "blending theory."

The Estoppel Theory. A sounder view of the creation of private easements in public ways is based on the estoppel theory, rather than implied dedication. This view assumes that the grantee is led to believe that the streets or other conveniences exist in reality as well as on the plat shown to the grantee as an inducement for him to purchase. Tiffany calls this "estoppel by representation."[20] The California court, in *Danielson v. Sykes*,[21] clearly indicated that an easement by estoppel may exist irrespective of any easement arising by virtue of the owner's property abutting on an existing public highway, stating: *"This private easement is entirely independent of the fact of dedication to public use, and is a private appurtenance to the lots, of which the owners cannot be divested except by due process of law."* [Citations omitted, emphasis added.][22]

The Private Easement in Washington

The Washington court adopts the distinction between public and private easements. Thus, vacation of the public right does not extinguish a pre-existing private easement.[23] In *Van Buren v. Trumbull*[24] this problem arose in a statute of limitations context.[25] The statute[26]

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[19] See Highway Holding Co. v. Yara Eng'r Corp., 22 N.J. 119, 123 A.2d 511 (1956), to the effect that a resolution vacating a street does not take away, or in the least impair, the private rights of an abutting owner; it is only a surrender or extinction of the public easement. In New Jersey, purchase in reliance on an undedicated plat dedicates streets, alleys, and other delineated facilities to the public, and such dedication continues and cannot be revoked except by consent of the municipality.

[20] 3 Tiffany, Real Property § 800, p. 310, n. 5 (1939).

[21] 157 Cal. 686, 109 Pac. 87 (1910).

[22] *Id.* at 687, 109 Pac. at 88. The court further stated: "It is claimed... that this private right of way is limited to the use necessary for ingress and egress and that it embraces only the street which abuts upon the particular lot in question and such other streets as may lead therefrom to some public highway or place.... When a lot conveyed by a deed is described by reference to a map, such map becomes a part of the deed. If the map exhibits streets and alleys, it necessarily implies or expresses a design that such passageways shall be used in connection with the lots, and for the convenience of the owners in going from each lot to any and all the other lots in the tract laid off." For further cases on this point, see Annot., 28 L.R.A. (n.s.) 1024 (1910). With regard to the effect of vacation on these rights see Annot., 150 A.L.R. 644 (1944). See also Highway Holding Co. v. Yara Eng'r Corp, *supra*, n. 19.

[23] Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891 (1916).

[24] *Ibid.*

[25] Wash. Sess. Laws 1890 c. XIX, § 32, p. 603, which originally provided: "Any

barred any claim of a public easement in a road which, having been dedicated, remained unopened for a period of five years. The question was whether the vacation effected by the statute would extinguish private easements in such streets. The court held the vacation had no effect on private easements of common grantees, declaring that the two easement rights remained separate and distinct, so that the private easement was enforceable against common grantees and the grantor.

In *Howell v. King County*[27] the court stated that the *Van Buren* rule was based upon the principle that since the dedicator of a plat could not defeat a grantee's right to an easement in the street upon which his land abuts, common grantees from him cannot, as among themselves, question this right. Thus the private easement persists, unless lost by adverse possession or a tax foreclosure sale.[28] The *Van Buren* case definitely established the principle of "easement by estoppel" in Washington.[29] However, if the factual situations of the above cases are analyzed carefully, it may be found that this jurisdiction did not have to adopt language of easement by estoppel, as the easements created in these situations are really a result of implied grant.

Burkhard v. Bowen[30] held that an earlier case, *Tamblin v. Crowley*,[31] did not modify or limit the *Van Buren* rule because of the peculiar circumstances in *Tamblin*, where the party claiming easement rights to a strip acquired his abutter's status through a tax foreclosure sale. The argument successfully urged in the *Tamblin* case was that the

county road, or part thereof, which has heretofore or may hereafter be authorized, which remains unopened for public use for the space of five years after the order is made or authority granted for opening the same, shall be and the same is hereby vacated, and the authority for building the same barred by lapse of time."

[26] The above article is now codified as RCW 36.87.090 and is substantially the same as in note 25 *supra* with the following proviso: "*Provided,* That this section shall not apply to any highway, road, street, alley, or other public place dedicated as such in any plat, whether the land included in such plat is within or without the limits of an incorporated city or town, or to any land conveyed by deed to the state or to any county, city or town for highways, roads, streets, alleys, or other public places." See also RCW 35.79.010 regarding formal vacation on the part of a municipality.

[27] 16 Wn.2d 557, 134 P.2d 80 (1943).

[28] Adverse possession as affecting private easement rights is not within the scope of this Comment. However, in Turner v. Davisson, 47 Wn.2d 375, 287 P.2d 726 (1955), the court held in a confusing opinion that since the abutter who acquires the abutting tract of land by adverse possession cannot trace his title back to a common grantor, he cannot assert his right to private easements created by representations of his predecessor, who is barred by the adverse possession statute.

[29] An interesting sidelight to the easement problem is the effect of title obtained through tax foreclosure sales or adverse possession when asserted against the grantee who, or whose predecessor in interest, purchased from the original grantor who dedicated the subdivision. Tamblin v. Crowley, 99 Wash. 133, 168 Pac. 982 (1917), held that after vacation of a road, adverse possession, resulting in ultimate title, would not destroy the easement rights, but a tax foreclosure sale after such vacation will divest both the private ownership and the private easement.

[30] 32 Wn.2d 613, 203 P.2d 361 (1949).

[31] *Supra* note 29.

party could not assert the right of easement by estoppel since he was unable to claim through a common grantor. The problem of the effect of tax foreclosures and subsequent sales upon easements was clarified by the legislature by the enactment in 1959 of RCW 84.64.460.[32]

Vacation or alteration of the public's easement in public streets dedicated by virtue of filing and acceptance of the plat does not extinguish the private easement of purchasers deriving their title through mesne conveyances traceable to the common grantor. However, caution should be taken against confusing the right to assert private easements against other grantees with the right to object to a formal vacation by the public officials. In the latter instance no one other than an abutting owner can object to the vacation, without showing that his property suffered special damages other than the general damage sustained by the public in the loss of the public easement.[33]

Conflict of Interests: Private Easements v. Limited Access Freeways

Although many opinions can be found dealing with the abutter's rights respecting private easements implied by law, few if any decisions have considered the problem of the nonabutter's interests which arise solely by virtue of plat representations and estoppel. Most cases dealing with the deprivation of property rights through eminent domain proceedings regard only the rights of abutting owners. Therefore, in the following sections of this Comment, comparison will often be made to the abutter's rights, and analogy drawn to the rights of the nonabutter.

The question of the effect on abutting or nonabutting easement rights of changes in the highway pattern has caused much litigation. Generally the courts, or more fundamentally, the lawyers pleading the cases, confuse the rights of an abutter or nonabutter to object to the changing of the existing highway, with the rights these property owners have by virtue of existing private easements. Freeway or turnpike problems arise mainly in urban areas, since property is seldom platted and dedicated in more sparsely settled communities. No matter how private easements were created, recognition must be given to the fact of their existence, and that deprivation of either the abutter's or nonabutter's easement constitutes a legal injury.

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[32] Wash. Sess. Laws 1959 c. 129, § 1 at 666, providing that any tax deeds issued pursuant to a tax foreclosure sale will be subject to private easements existing of record prior to the year for which the tax was foreclosed.

[33] Capitol Hill Methodist Church v. City of Seattle, note 16 *supra*.

Police Power v. Eminent Domain: A labeling trap. One Washington attorney made some observations which serve as a starting premise, pointing out the problem that most often traps the courts and attorneys alike.[34] The trap lies in the method used to determine rights to compensation, *i.e.* labeling the type of public action which deprives the individual of his easement, without analysis of the nature of the private right. If the court finds the public took the right because of a need for improvements to existing facilities, the action would be classified as within the police power to regulate traffic. In such a case, the desired change, no matter how detrimental to landowners in the vicinity, is not compensable. However, upon finding the action taken is to create a *new mode* to handle through traffic, distinguished from merely changing the existing traffic pattern, the court will label this eminent domain, and allow the injured party compensation for the loss of an easement right. But as Clarke points out, the line of distinction between these two theories is hard to find.[35]

The basic problem resolves itself into a judicial balancing of the cost to the public if deprived of the new mode of travel, against the necessity and cost to the public of giving each property owner adversely affected just compensation for lost easement rights. Neither of the two theories, as they exist, considers anything more than immediate access rights. Extinguishment of existing subdivision easements seldom is placed in issue. However the nonabutting property owner's private easement within the subdivision, arguably at least, is a compensable property right.

Statutes Protecting Landowners. The eminent domain statute[36] provides that whenever the acquisition of "land, real estate, premises, or *other property*" is deemed necessary for public use, a jury is to be impaneled for determination of the extent of damages by the taking. The statute states that the taking of *any property* is compensable. The language, "or *other property*" would certainly include existing easements, they being considered property rights. It should not matter whether the easement arises by virtue of a purchase in reliance on a plat, or merely by implication because the land abuts on an existing

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[34] Owen Clarke, *The Limited-Access Highway,* 27 WASH. L. REV. 111, 120 (1952).
[35] *Id.* at 121: "But where does the police power end and the power of eminent domain begin? This is the baffling question that has caused so much judicial confusion in right of access cases. Some courts have attempted to generalize by declaring that the police power ends when the injury to the property owner in not being paid for his property is greater than the injury to the public in having to pay for the property."
[36] RCW 8.04.010.

dedicated street which is designated for conversion into a limited or non-access highway.

In Washington the abutter's right of access is protected by a separate statute,[37] which provides that no existing public highway, road or street shall be constructed as a limited access facility except upon the waiver, purchase, or condemnation of the abutting owner's right of access. Special provision is made for existing roadside businesses[38] on existing service highways which are declared non-access highways. The statute defines an existing highway as any and all highways, roads, and streets duly established, constructed and in use.[39] This definition does not, however, include new highways, roads, or streets, nor portions of existing ones which are relocated.[40]

Nature and Scope of the Easement of Nonabutting Owners. The nonabutting owner's private easement is a property right[41] which is often taken, but for which compensation is seldom given. The only cases found allowing recovery for damages to access rights-of-way were those wherein the easement existed by implication of law because the property owner happened to abut on a public street. No cases have been found directly on the point of compensation for loss of easement rights held by virtue of subdivision plat representations. It seems that an easement held by a nonabutting owner should be as compensable a property right as the easement held by an abutter.

Olsen v. Jacobs[42] was a case dealing only with the right of nonabutting property owners to set aside or object to public vacation of a street. Though the case did not discuss the law pertaining to the rights and remedies of common grantees against each other for protection of subdivision easements, the court did come up with some disturbing language, which may or may not affect such rights. Plaintiffs were owners of homes abutting on Haller Circle, from which the road vacated provided the only *direct* access to the lake shore. Defendants were owners of property immediately adjacent to the road vacated. Plaintiffs claimed the closing of the road would shut off ingress and egress from Haller Lake and further that they would be deprived of free access to the lake, except by the street to the north, immediately

[37] RCW 47.52.080.
[38] *Ibid.*
[39] RCW 47.52.011.
[40] *Ibid.*
[41] Rose v. State, 19 Cal.2d 713, 123 P.2d 505 (1942); Danielson v. Sykes, 157 Cal. 686, 109 Pac. 87 (1910). See also 25 AM. JUR., *Highways* § 154; 39 C.J.S., *Highways* § 141.
[42] 193 Wash. 506, 76 P.2d 607 (1938).

across the water from the street purported to have been closed, and one other street on the west side of the lake. The court, in denying the relief sought, held the inability to reach the lake does not affect the question of ingress from plaintiffs' property. The opinion further stated that the question of ingress and egress can relate only to the property owned by the complaining party, and not to some other property or place of business or amusement in the subdivision.

While the rule propounded in the *Olsen* case may be entirely correct in terms of right to object to public vacation, it certainly fails to account for the fact that property values of the Haller Lake subdivision probably depended upon accessibility to the lake. This factor most likely was an inducement which persuaded the plaintiffs to purchase the property in the first instance. If the defendants were common grantees, in the same subdivision, this should have been alleged, and injunction should have been sought against the defendant's obstruction of the street once it had been vacated.[43]

Capitol Hill Methodist Church v. Seattle[44] held that any private easement in a street by virtue of reliance on plat delineations is only an easement for those ways which are necessary for reasonable access to surrounding properties. The court cited several cases[45] in support of this point, but none of these had expressed such a limited application of the rule.[46] The *Capitol Hill* case mentioned the *Olsen* case, the holding of which is practically identical, but neither case decided the exact scope or extent of these private easements in Washington. The only conclusion to be reached is that the private easement exists as against other common grantees, but has no effect on the vacation of the public easement by the municipality; and conversely, vacation has

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[43] Gerald Park Improvement Ass'n v. Bini, 138 Conn. 232, 83 A.2d 195 (1951). See also note 18 *supra*.

[44] 52 Wn.2d 359, 324 P.2d 113 (1958).

[45] Brown v. Olmsted, 49 Wn.2d 210, 299 P.2d 564 (1956); Burkhard v. Bowen, 32 Wn.2d 613, 203 P.2d 361 (1949); Howell v. King County, 16 Wn.2d 557, 134 P.2d 80 (1943); Van Buren v. Trumbull, 92 Wash. 691, 159 Pac. 891 (1916).

[46] See also Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316 (1906), where plaintiff owned a lot abutting on the north west corner of the intersection of Sixth and "H" streets. Defendant, owning lots north of plaintiff abutting both sides of "H" street at the intersection of Fifth and "H" streets, sought to have the abutting portion of "H" street (north of plaintiff's) vacated. This vacation formed a *cul de sac* as to plaintiff's access over "H" street to Fifth street. The court held that the plaintiff as nonabutting owners to the portion vacated suffered no other injury by vacation save degree than did the public. Therefore because the plaintiff still had ingress and egress by virtue of abutting Sixth street, and the non-vacated portion of "H" street forming an intersection with Sixth street, they could not show unreasonable damage to their access. The court pointed out that the plaintiff was not actually *"within* the *cul de sac* created by the vacation, but only at its entrance!" There was no discussion of the problem of loss of possible easement rights by virtue of sale by reliance on the plat and dedication thereof.

no affect on the enforcement of private easements as against other owners in the subdivision.

Recognizing the existence of private easements in Washington, it must be conceded that they are property rights, and are protected under the statutes mentioned above. Therefore the next problem is to examine the effect of alteration of existing streets on these private property rights. The question is whether alteration, adversely affecting these private easements, will create a claim for damages by property owners showing a diminution in their property values. In conjunction with this, examination should be made to find what the property owner must show in order to prove a diminution in his property value.

Effect of Condemnation on Private Easement Rights

Private easements can be further refined into two distinct types. The first is the easement implied by law arising by virtue of the property abutting on an existing public highway. This easement is distinguishable from easements created by estoppel, because the latter easement is implied from representations made by the grantor, whereas the former is a rule of law. A satisfactory explanation for the easement raised by law can be found neither in its historical, nor logical development, but this right has gained such acceptance that there is little chance that the doctrine will be overturned.[47] A further distinction should be made from the easement raised by law and that which arises from implied grant or incorporation in the actual deed of conveyance.

Loss of Direct Access. Upon the conversion of a land service road into a limited access highway, there is a compensable taking of the property right of ingress and egress.[48] Where the abutter's direct access is lost by a conversion, but a service road through which the property owner has access to the highway at some distant point is provided by

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[47] Annot., 43 A.L.R.2d 1072 (1955); Clarke, *The Limited-Access Highway*, 27 Wash. L. Rev. 111 (1952).

[48] People v. La Macchia, 41 Cal.2d 738, 264 P.2d 15 (1953); Boxberger v. State Highway Comm'n, 126 Colo. 526, 251 P.2d 920 (1952); Department of Pub. Works & Bldgs. v. Wolf, 414 Ill. 386, 111 N.E.2d 322 (1953); Nichols v. Commonwealth, 331 Mass. 581, 121 N.E.2d 56 (1954); Petition of Burnquist, 220 Minn. 48, 19 N.W.2d 394 (1945); Board of Supervisors v. Wilkin, 260 App. Div. 366, 22 N.Y.S.2d 465 (1940); *In re* Appropriation of Easement for Highway Purposes, 93 Ohio App. 179, 112 N.E.2d 411 (1952); State Highway Comm'n v. Burke, 200 Ore. 211, 265 P.2d 783 (1954); McMoran v. State, 155 Wash. Dec. 36, 345 P.2d 598 (1959); State v. Fox, 53 Wn.2d 216, 332 P.2d 943 (1958); State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957); Walker v. State, 48 Wn.2d 587, 295 P.2d 328 (1956).

the state, compensation for the loss of direct access has been allowed.[49] Other courts have held that mere circuity of route, resulting from such a conversion, is not compensable in damages if there is available another existing means of indirect access.[50]

Necessity to Abut on an Existing Highway. While the abutter on an existing service street converted into a limited or non-access highway is entitled to compensation, one abutting on a newly constructed limited or non-access thoroughfare does not have a compensable right if no highway facility existed there previously. In the latter instance, there could be no easement of access to a non-existent highway and therefore no compensation is granted to abutters on the new road.[51]

In *State v. Calkins*[52] eminent domain proceedings were brought to condemn and appropriate a right of way across the premises of defendant for the purpose of constructing a new limited access highway. Defendant's farm bordered on the westerly side of a county road, and was bounded on the north by a city street marking the limits of Ephrata, Washington. The acquired east-west right of way bisected the defendant's farm, leaving the north tract served only by the city street, and the south tract by the county road. The defendant was given a twenty-foot-wide approach on either side of the highway, for the purpose of crossing the highway with farm equipment. The court held that there had not been a constitutional taking of an alleged easement of access to the highway, since no highway had previously existed; therefore no easement could be claimed to the new limited access road.

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[49] People v. Ricciardi, 23 Cal.2d 390, 144 P.2d 799 (1943); McMoran v. State, 155 Wash. Dec. 36, 354 P.2d 598 (1959) (where the highway department constructed a concrete curb along the edge of the outside lane of a highway, which abutted plaintiff's property, and a service road intended to be for local use and to give plaintiff and others access to the highway at a point some distance from plaintiff's property; *Held:* plaintiff was entitled to damages for loss of direct access to the highway).

[50] See People by Dept. of Pub. Works v. Schultz Co., 123 Cal. App.2d 925, 268 P.2d 117 (1954), which held that compensation was properly denied for the loss of a direct access right to a highway which was converted to a freeway, where a new access right of way of a proposed outer highway would be as good or better than the pre-existing one. See also Iowa State Highway Comm'n v. Smith, 248 Iowa 869, 82 N.W.2d 755 (1957); Harreld v. Mississippi State Highway Comm'n, 234 Miss. 1, 103 So. 2d 852 (1958); Muse v. Mississippi State Highway Comm'n, 233 Miss. 694, 103 So. 2d 839 (1958); Gilmore v. State, 208 Misc. 427, 143 N.Y.S.2d 873 (1955); Carazalla v. State, 269 Wis. 593, 71 N.W.2d 276 (1955). *Cf.*, Warren v. Iowa State Highway Comm'n, 250 Iowa 473, 93 N.W.2d 60 (1958); Oklahoma Turnpike Auth. v. Chandler, 316 P.2d 828 (Okla. 1957).

[51] Schnider v. State, 38 Cal.2d 439, 241 P.2d 1 (1952); People v. Thomas, 108 Cal. App.2d 832, 239 P.2d 914 (1952); Riddle v. State Highway Comm'n, 184 Kan. 603, 339 P.2d 301 (1959); Medearis v. State *ex rel.* Dept. of Highways, 341 P.2d 607 (Okla. 1959); State v. Calkins, 50 Wn.2d 716, 314 P.2d 449 (1957).

[52] *Supra* note 51.

Compensable Claims by Nonabutting Owners. A different problem is raised where the nonabutting owner claims damages for loss of existing easements. This point has seldom been an issue in litigation, except in circumstances creating a *cul de sac*.[53] Little law, if any, can be found on this general point. Several jurisdictions, including Washington, hold that private easements do not blend into public easements arising by dedication.[54] Therefore examination of the effect of condemnation on other types of property rights may prove helpful in foreseeing how courts will solve this problem.

Where an instrument dedicated a park to public use in a subdivision,[55] it was held that the execution of deeds to purchasers of the lots gave them a fee to the park burdened with an easement right in all the owners in the subdivision to use that park. Upon condemnation of the east half, the lot owners directly across the street were entitled to compensation, fixed at an amount including the value of the easement rights they had in the park. The court recognized the easement as extending to the use of the whole park, and therefore lot owners along the west half (the half of the park not condemned) were also entitled to compensation for the loss of their easement rights in the whole park. This case is the closest example found to a situation where the nonabutting owner sues for compensation arising from condemnation which destroys existing private easements.[56]

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[53] See note 46 *supra*. It is possible to draw an analogy from the *Ponischil* case for a *cul de sac* formed by the construction of a non-access highway over a strip where there previously existed a land-service road. It is hoped that the court will not draw such an analogy, when faced with the problem.

[54] The theory upon which these easements will continue to exist entirely independent of public rights growing out of dedication is by implied grant, implied covenant, or estoppel. See Annot., 7 A.L.R.2d 607, 628 (§ 5) (1949). See also note 19 *supra*.

[55] United States v. 11.06 Acres of Land in City of St. Louis, Mo., 89 F. Supp 852 (E.D. Mo. 1950).

[56] In United States v. 4.105 Acres of Land in Pleasanton, 68 F. Supp. 279, 289 (N.D. Calif. 1946), where the government sought to condemn parcels of land for the purpose of gaining access to an underground water supply, the city and county of San Francisco claimed an interest in the water as an appurtenance to certain other lands owned by the city in fee. The city claimed its right by virtue of a deed to it in 1930 from the water company that originally owned the land. The deed included an easement or covenant allowing the city to take water from the lands sought to be condemned. The court found that water rights granted to the city were primarily covenants running with the land, thus burdening the successive owner, and were actually property rights in an easement sense. In holding that such rights were compensable, the court stated: "a right with respect to real property need not attain the dignity of 'an estate in real property' to be compensable when taken into the public domain." The court further held that the water rights, which had been granted the city, diminished the value of the condemned parcel adjacent to the municipally owned land. Since such rights were easements appurtenant to the land conveyed to the city, the government in condemning the parcel had to give compensation for the easement taken.

Another case[57] allowed compensation for the loss of easement rights in a condemned alley which did not totally abut on the plaintiff's property.[58] The conveyance pre-dated the dedication by some two or three years. Therefore, the court held that every person having bought in reliance on the deed prior to dedication who had a need of access over the alleys condemned (for public parking) had a right to be compensated for the taking of the alley.

It would seem quite reasonable in the light of the above cases to argue that the easement acquired (whether by reference to a plat, or by merely abutting on the street which is altered) is definitely a property right which, when taken, ought to be compensable through the bringing of inverse condemnation.

Restrictive Covenants in the Subdivisions. Analogy can be made to the rules governing restrictive covenants in subdivisions. Most of these covenants arise in the context of building restrictions, but basic principles of law indicate they are similar to easement rights, and are often referred to as "negative easements."[59] Two different theories arise with regard to condemnation proceedings. The minority view is that since all property is held subject to the power of eminent domain, the rights of the condemnor are impliedly excepted from the operation of restrictive covenants; and if not so excepted, the condemnor not being a party or privy to the contract creating the covenant, no action for damages will lie against the condemnor.[60] The fallacy here is the initial use of contract reasoning to determine a real property right. If contract reasoning were applicable, the result is tenable since frustration of contract by legal means does not render the promisor liable in damages. The majority view, on the other hand, rests on the theory that a negative easement created by a building restriction is a vested interest in the land, and therefore compensable by eminent domain

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[57] Trustees v. Public Parking Auth. of Pittsburgh, 383 Pa. 383, 119 A.2d 79 (1956).

[58] See Cox's, Inc. v. Snodgrass, 372 Pa. 148, 92 A.2d 540 (1952).

[59] 7 THOMPSON, REAL PROPERTY § 3631 at p. 121 (perm. rev. ed. 1940): "A restrictive covenant as applied to land creates what is known in law as an easement; that is, a servitude without any profit whatever out of the substance of the neighboring tenement, but merely the right to claim from it submission or forbearance.... An easement is negative in character when the owner of the servient tenement is restricted in the exercise of the natural rights of property by the existence of the easement.... [I]t may be stated generally that, where a common grantor opens up a tract of land to be sold in lots and blocks, and, before any lots are sold, inaugurates a general scheme of improvement for such entire tract intended to enhance the value of each lot, and each lot, subsequently sold by such grantor, is made subject to such scheme of improvement, there is created and annexed to the entire tract what is termed a negative equitable easement, in which the several purchasers of lots have an interest, and between whom there exists mutuality of covenant and consideration."

[60] See Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637

proceedings, if such covenants are violated by subsequent action taken after condemnation. Under this view all property owners in the subdivision are entitled to damages for the violation.[61] The basic reason for allowing damages is the decreased value of the property when the nature of the neighborhood is changed by a violation of the restrictive covenants.

In the *City of Raleigh* case[62] the condemnor built an elevated water tower on property within a subdivision having a restriction that only residence buildings could be built therein. This violation entitled all property owners in the subdivision to damages.

Violation of restrictive covenants by condemnation does not only bind public authorities. Where a railroad purchased lots in a tract subject to restrictions, including a prohibition against the erection of any structure for business purposes, and built and maintained thereon an electric railroad, the court found a deprivation of property rights entitling the lot owners in the tract to compensation.[63]

In *Burger v. City of St. Paul*,[64] the city council of St. Paul had created a restricted residence district by condemnation proceedings. Defendant subsequently obtained a permit from the council to remodel his single dwelling into a fourplex—a definite violation of the restriction. Plaintiff, a lot owner in the same subdivision, prevailed in an action to enjoin the building of the fourplex. The court stated that easements, whether in the nature of a right of way, a restrictive covenant, or a negative or equitable easement (servitude) are property within the meaning of the constitutional provisions against taking of property without just compensation. Therefore the owners of lots in this district acquired by virtue of the original condemnation, property rights which attached to the ownership of the lots.

CONCLUSION

If the cases dealing with restrictive covenants are analyzed in the

(Fla. 1955), where it was held that restrictions in the general subdivision plans of the town against erection or maintenance of buildings other than residences, duplexes, apartments and hotels were defined as negative easements or equitable servitudes which were not compensable in eminent domain proceedings. See also 18 AM. JUR., *Eminent Domain* § 157 at p. 788; Annot., 122 A.L.R. 1464 (1939); 67 A.L.R. 385 (1930); 17 A.L.R. 554 (1922).

[61] City of Raleigh v. Edwards, 235 N.C. 671, 71 S.E.2d 396 (1952); City of Shelbyville v. Kilpatrick, 322 S.W.2d 203 (Tenn. 1959). Both of these cases were first impression cases in their respective jurisdictions. Both held that the violation of the restriction, after condemnation proceedings were had, was compensable to the surrounding property owners in the subdivision.

[62] *Supra* note 61.

[63] Flynn v. New York W. & B. Ry., 218 N.Y. 140, 112 N.E. 913 (1916).

[64] 241 Minn. 285, 64 N.W.2d 73 (1954).

light of holdings that private easements survive public vacation, it is possible to argue that under the constitutional requirements of eminent domain, payment must be made to all those who lose any property rights due to public action taken, whether it be by condemnation of property to build new highways or merely the alteration of an existing road to develop a limited or non-access highway system. In the former situation, while there would be no right of access to a newly built freeway, there certainly would be a lost right if that highway were built through the center of an existing subdivision. While the owners in the subdivision cannot claim access rights in and to the freeway, they can claim compensation for damages to easement rights they possessed, prior to the public action, to reach other residences or businesses in that subdivision.

One of the basic reasons little law can be found in this area is simply the lack of awareness on the part of attorneys and courts when condemnation or vacation cases arise. They look only to the right to question the vacation and not to the existence of private easement rights. Since easements are characterized as property rights, deprivation should entitle the person losing such to full compensation therefor. This right can and should be protected by safeguards such as eminent domain and inverse condemnation, both of which are tools to assure the property owner his just compensation.

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